A

Orion Choice Sdn Bhd v Bellajade Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-133–01 OF 2020
LEE SWEE SENG, SUPANG LIAN AND AZIMAH OMAR JJCA
30 JUNE 2023

C *Contract — Interpretation — Intention of parties — Plaintiff contracted to buy entire building from defendant — Final purchase price was subject to building being re-measured after completion — Re-measurement showed defendant had gained 422 sq metres of floor space that was not accounted for and should compensate plaintiff for same based on rate of adjustment agreed upon between*
D *parties — Defendant on other hand contended it had overpaid plaintiff for substantial amount of space taken up for common areas and amenities which should have been excluded from computation of purchase price — Defendant contended that only lettable floor space should be included and non-lettable floor space excluded — Whether defendant's interpretation of contract was illogical and made*
E *no commercial sense as contract was for sale and purchase of entire building en bloc and not just of the lettable floor spaces within it — Whether High Court judge erred in agreeing with defendant's interpretation and allowing its counterclaim whilst dismissing plaintiff's claim*

F The parties herein entered into a sale and purchase agreement ('SPA') under which the appellant agreed to sell to the respondent an entire building known as Plaza Palas consisting of 21 floors of office space, a VIP lounge above the office block, a lift motor room/viewing area on the top-most floor and four basement areas to house 453 car parking bays and 46 motorcycle parking bays.
G The provisional purchase price under the SPA was RM139,250,000. Clause 7A of the SPA read with its First Schedule provided that upon completion of the building, the purchase price would be adjusted based on a final re-measurement of the building by the appellant's licensed surveyor. The adjustment rate to be applied was RM2,484 per sq metre for the floors and
H RM40,000 per car park bay. Following the completion of the building, the parties could not agree on the adjustment to be made to the purchase price resulting in litigation at the High Court which eventually went on appeal to the Court of Appeal ('COA'). The COA directed both parties to engage their own surveyors to re-measure the building in compliance with cl 7A and the First
I Schedule ('the COA direction'). Following the surveys done by the parties, the appellant concluded that the respondent had to pay an additional RM9,434,232 towards the purchase price to compensate for the extra 3,558 sq metres of floor space it had gained. The respondent, on the other hand, contended that it had overpaid the appellant in the sum of RM45,886,932 for

18,473 sq metres of floor area which should have been excluded from the calculation of the final purchase price because they were common facility areas such as stairways, toilets, lobby and lift areas, driveways, corridors, prayer room, kitchen, canteen and the like, and not lettable spaces. The respondent counterclaimed against the appellant for repayment of the RM45,886,932. The reason for the widely divergent results of the surveys was due to the fact that whilst the appellant's surveyor had measured the total built-up area of the building, the respondent's surveyor had measured only the total lettable floor space and had excluded areas meant for common usage and facilities. The High Court interpreted the COA direction to mean that the respondent's survey method should be adopted rather than the appellant's and, consequently, dismissed the appellant's claim and allowed the respondent's counterclaim. In the instant appeal, the appellant argued that the High Court's decision was perverse and made no business sense as the SPA was clearly for the sale of the entire building en bloc and not just the lettable space on each floor.

Held, unanimously allowing the appeal, setting aside the High Court's decision and granting the appellant judgment for the sum of RM1,048,248:

(1) Nothing in the First Schedule of the SPA or in the disputed COA direction indicated any intention of the parties or in the direction of the court that there was to be a further division or classification of the areas in the building into lettable and non-lettable spaces so as to exclude any specific portions of any respective floor from the computation of the purchase price (see paras 7–8).

(2) The SPA was clearly for the sale of the entire building and not just of any specific lettable portions thereof minus the common areas and facilities. The respondent's method of calculation was therefore directly in conflict with the disputed COA direction and the SPA itself (see paras 4, 11 & 16).

(3) The High Court judge had erred in going beyond the broad and limited classifications which were plainly agreed upon in the SPA and in improving the respondent's bargain by allowing it to exclude portions of the floor area which were never covenanted to be excluded in the SPA. It made no business or commercial sense to hold that the respondent whilst buying the entire building was buying the same without obtaining ownership of the common areas and amenities. It was preposterous to suggest that the respondent would only become owner of the lettable spaces within the building whilst the common areas, amenities and facilities would continue to be owned by the appellant. The court would not subscribe to such a perverse interpretation of the contract but one which made business sense in line with the commercial purpose of the transaction (see paras 23, 26, 29 & 34).

(4) Based on the appellant's surveyor's report, the respondent had gained an excess floor area of 422 sq metres which had not been accounted for. Applying the contractually agreed rate of adjustment of RM2,484 per sq metre, the respondent was obliged to pay the appellant an extra sum of RM1,048,248 towards the purchase price and judgment for the said sum was hereby granted. No pricing adjustments were required to be made for the vehicle parking areas as there was no change in the total number of parking bays. With regard to the respondent's counterclaim, the same was wholly misconceived and unsustainable (see paras 39–41).

[Bahasa Malaysia summary

Pihak-pihak di sini telah memasuki perjanjian jual beli ('PJB') di mana perayu bersetuju untuk menjual kepada responden keseluruhan bangunan yang dikenali sebagai Plaza Palas yang terdiri daripada 21 tingkat ruang pejabat, ruang istirahat VIP di atas blok pejabat, lif bilik bermotor/kawasan meninjau di tingkat paling atas dan empat kawasan bawah tanah untuk menempatkan 453 ruang letak kereta dan 46 ruang letak motosikal. Harga belian provisional di bawah SPA adalah RM139,250,000. Klausa 7A SPA dibaca dengan Jadual Pertamanya dengan syarat bahawa apabila bangunan tersebut siap, harga belian akan diselaraskan berdasarkan ukuran semula akhir bangunan oleh juruukur berlesen perayu. Kadar pelarasan yang akan dikenakan adalah RM2,484 setiap meter persegi untuk lantai dan RM40,000 setiap ruang tempat letak kereta. Selepas penyiapan bangunan tersebut, pihak-pihak tidak dapat bersetuju dengan pelarasan yang akan dibuat kepada harga belian yang mengakibatkan litigasi di Mahkamah Tinggi yang akhirnya terdapat rayuan ke Mahkamah Rayuan ('MR'). MR mengarahkan kedua-dua pihak untuk melantik juruukur mereka sendiri untuk mengukur semula bangunan tersebut dengan mematuhi klausa 7A dan Jadual Pertama ('arahan MR'). Berikutan ukuran yang dibuat oleh pihak-pihak, perayu membuat kesimpulan bahawa responden perlu membayar tambahan RM9,434,232 terhadap harga belian untuk melengkapkan tambahan 3,558 meter persegi ruang lantai yang telah bertambah. Responden pula berpendapat bahawa ia telah membayar lebihan kepada perayu sebanyak RM45,886,932 untuk 18,473 meter persegi keluasan lantai yang sepatutnya dikecualikan daripada pengiraan harga belian akhir kerana ia adalah kawasan kemudahan bersama seperti tangga, tandas, kawasan lobi dan lif, jalan masuk, koridor, surau, dapur, kantin dan seumpamanya, dan ruang yang tidak boleh disewa. Responden membuat tuntutan balas terhadap perayu untuk pembayaran balik RM45,886,932. Alasan keputusan ukuran yang berbeza secara meluas adalah disebabkan oleh fakta bahawa sementara juruukur perayu telah mengukur jumlah kawasan binaan bangunan, juruukur responden hanya mengukur jumlah ruang lantai yang boleh disewakan dan telah mengecualikan kawasan yang dimaksudkan untuk penggunaan bersama dan fasiliti. Mahkamah Tinggi mentafsir arahan MR bermaksud bahawa kaedah ukuran responden harus digunapakai berbanding perayu dan, akibatnya, menolak tuntutan perayu dan membenarkan tuntutan balas

responden. Dalam rayuan semasa, perayu berhujah bahawa keputusan Mahkamah Tinggi adalah bertentangan dan tidak masuk akal kerana SPA jelas untuk penjualan keseluruhan bangunan secara *en bloc* dan bukan hanya ruang yang boleh disewa di setiap tingkat.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan memberikan penghakiman perayu untuk jumlah RM1,048,248:

(1) Tiada apa-apa dalam Jadual Pertama SPA atau dalam arahan MR yang dipertikaikan menunjukkan apa-apa niat pihak-pihak atau dalam arahan mahkamah bahawa perlu ada pembahagian atau pengelasan selanjutnya bagi kawasan dalam bangunan tersebut kepada ruang boleh disewa dan tidak boleh disewa untuk mengecualikan mana-mana bahagian khusus mana-mana tingkat masing-masing daripada pengiraan harga belian (lihat perenggan 7–8).

(2) SPA adalah jelas untuk penjualan keseluruhan bangunan dan bukan hanya mana-mana bahagian tertentu yang boleh disewakan daripadanya dengan mengecualikan kawasan dan kemudahan bersama. Oleh itu kaedah pengiraan responden secara langsung bercanggah dengan arahan MR yang dipertikaikan dan SPA tersebut sendiri (lihat perenggan 4, 11 & 16).

(3) Hakim Mahkamah Tinggi telah terkhilaf apabila melangkaui klasifikasi yang luas dan terhad yang telah dipersetujui dengan jelas dalam SPA dan dalam menambah baik persetujuan responden dengan membenarkannya untuk mengecualikan bahagian-bahagian keluasan lantai yang tidak pernah diperjanjikan untuk dikecualikan dalam SPA. Ianya adalah tidak wajar dari segi perniagaan atau komersial untuk memutuskan bahawa responden semasa membeli keseluruhan bangunan tersebut telah membelinya tanpa memperoleh pemilikan kawasan dan kemudahan bersama. Ia adalah tidak masuk akal untuk mencadangkan bahawa responden hanya akan menjadi pemilik ruang boleh disewa di dalam bangunan manakala kawasan umum, kemudahan dan fasiliti akan terus dimiliki oleh perayu. Mahkamah tidak akan menerima tafsiran yang bertentangan terhadapa kontrak tersebut tetapi yang wajar dari segi perniagaan selaras dengan tujuan komersial transaksi tersebut (lihat perenggan 23, 26, 29 & 34).

(4) Berdasarkan laporan juruukur perayu, responden telah mendapat lebihan keluasan lantai seluas 422 meter persegi yang tidak diambil kira. Dengan menggunakan kadar pelarasan yang dipersetujui secara kontrak sebanyak RM2,484 sekaki persegi, responden diwajibkan membayar perayu sejumlah wang tambahan sebanyak RM1,048,248 terhadap harga belian dan penghakiman bagi jumlah tersebut telah dibenarkan. Tiada pelarasan harga perlu dibuat untuk kawasan parkir kenderaan

kerana tiada perubahan dalam jumlah tempat letak kereta. Berkenaan dengan tuntutan balas responden, perkara yang sama adalah sepenuhnya salah arah dan tidak dapat dipertahankan (lihat perenggan 39–41).]

Cases referred to

Bon Chong Hing & Anor v Gama Trading Company (Hong Kong) Ltd [2011] 4 MLJ 52; [2011] 6 CLJ 493, CA (folld)
CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1, FC (refd)
Prenn v Simmonds [1971] 3 All ER 237, HL (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770, FC (refd)

Appeal from: *Orion Choice Sdn Bhd v Bellajade Sdn Bhd* [2018] MLJU 1436 (High Court, Kuala Lumpur)

RK Sharma (with Armit Pal Singh and Ng Jun Wei) (Amrit & Co) for the appellant.
M Pathmanathan (with S Rutheran, Michele Kaur, Tee Yee Man and Chong Yi Zhen) (Sun & Michele) for the respondent.

Azimah Omar JCA:

BACKGROUND FACTS

[1] The appeal before us concerns the appellant-plaintiff's claim against the respondent-defendant for breach of contract (for the sale and purchase of an entire building) due to the respondent's refusal to make additional payments under cl 7A of the contract which allows for adjustments upon the provisionally agreed purchase price after the building was re-measured after its completion.

[2] The appellant contended that there was an excess of area which was unaccounted for in the provisional purchase price. Inversely, the respondent insisted that there were areas which were wrongfully accounted for and instead counterclaimed for the value of the shortfall of floor areas. Parties will be referred to in their respective capacities in the High Court below.

[3] Orion Choice Sdn Bhd ('the plaintiff/the vendor') had entered into a sale and purchase agreement with Bellajade Sdn Bhd ('the defendant/the purchaser') dated 26 March 2012 ('the SPA') in which the plaintiff agreed to sell while the defendant agreed to purchase an ENTIRE BUILDING known as Plaza Palas, consisting of 21 office floors (ground floor to 20th floor), one floor of VIP holding lounge (21st floor), one floor of lift motor room/viewing area

(22nd floor), together with 453 car park and 46 motorcycle park bays largely situated in the basement floors of the building (basement 1, 2, and 3 as well as the sub-basement) for the purchase price of RM139,250,000.

[4] Recital D of the SPA explicitly defines the whole and entirety of Plaza Palas as 'the building', while Recital G (read together with the First Schedule of the SPA) further particularised the contents of the building while grouping the basement parking floors into Parcel 1 and Parcel 2. It is entirely clear and vivid that the sale intended under the SPA is the *sale of the entirety of the building, and not only any specific lettable strata portions of the building*. Recital G and the First Schedule of the SPA is reproduced below for reference:

> G. The Vendor has obtained consent of the Registered Proprietor which the said consent has been endorsed herein agreed to sell and the Purchaser has agreed to purchase from the Vendor the building measuring approximately 56054 sq metres with land area of 29,086 square feet which are more particularly identified in PART II of the FIRST SCHEDULE together with 331 units of car park bays and 1 motorcycle park bays (for 16 motorcycles) in the building (hereinafter referred as to 'Parcel 1') and 122 units of car park bays and 1 motorcycle park bays (for 30 motorcycles) in the Apartment (hereinafter referred to as 'Parcel 2') which are more particularly identified in PART II of the FIRST SCHEDULE free from all encumbrances but subject to any condition express or implied and any restriction-in-interest in the issue documets of title to the Land or Building or strata titles to be issued to the Parcel 2 and with vacant possession at the purchase price as stated in PART I of the FIRST SCHEDULE upon terms and conditions hereinafter set out. The building, Parcel 1, Parcel 2 are hereinafter collectively referred to as the 'Properties'.)

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A

FIRST SCHEDULE

PART I

Purchase Price of the Properties:	Ringgit Malaysia One Hundred Thirty Nine Million Two Hundred Fifty Thousand (RM139,250,000-00)
Rate of adjustment of Purchase Price	(a) RM2,484 only per square metres (b) RM40,000-00 only per Car Park Bay.

B

PART II

Description of the Properties

Building

C

LEVEL	SECTION	FLOOR AREA (square metre)
BASEMENT 3	CAR & MOTORCYCLE PARKING	6,125
BASEMENT 2	CAR & MOTORCYCLE PARKING	6,125
BASEMENT 1	CAR & MOTORCYCLE PARKING	2,972
SUB-BASEMENT	CAR & MOTORCYCLE PARKING	3,000
GROUND FLOOR	OFFICE SPACE	1, 274
1ST FLOOR	OFFICE SPACE	1,469
2ND FLOOR	OFFICE SPACE	1,647
3RD FLOOR	OFFICE SPACE	1,647
4TH FLOOR	OFFICE SPACE	1,647
5TH FLOOR	OFFICE SPACE	1,647
6TH FLOOR	OFFICE SPACE	1,647
7TH FLOOR	OFFICE SPACE	1,853
8TH FLOOR	OFFICE SPACE	1,853
9TH FLOOR	OFFICE SPACE	1,853
10TH FLOOR	OFFICE SPACE	1,853
11TH FLOOR	OFFICE SPACE	1,853
12TH FLOOR	OFFICE SPACE	1,853
13TH FLOOR	OFFICE SPACE	1,853
14TH FLOOR	OFFICE SPACE	1,853
15TH FLOOR	OFFICE SPACE	1,853

D

E

F

16TH FLOOR	OFFICE SPACE	1,853
17TH FLOOR	OFFICE SPACE	1,853
18TH FLOOR	OFFICE SPACE	1,853
19TH FLOOR	OFFICE SPACE	1,853
20TH FLOOR	OFFICE SPACE	1,853
21ST FLOOR	V.I.P. HOLDING LOUNGE	399
LIFT MOTOR ROOM	LIFT MOTOR ROOM/VIEWING AREA	513
TOTAL AREA		56,054

G

Parcel 1 & Parcel 2

LEVEL	NO. OF CAR PARK BAYS	NO. OF MOTORCYCLE PARK BAYS
Ground Floor	NIL	12
SUB-BASEMENT	58	7
BASEMENT 1	64	11
BASEMENT 2	164	8
BASEMENT 3	167	8
TOTAL	453	46

H

I

[5] In line with cl 7A of the SPA, the First Schedule has already provided the rate of adjustment to the provisional purchase price upon final re-measurement of the building by the vendor's (the plaintiff-appellant's) licensed surveyor.

There are two distinct rates of adjustments provided. For the 21 office floors ('office space floors'), the set rate of adjustment is RM2,484 per sq metres. Separately and distinctively, for the other basement car and motorcycle parking floors ('car and motorcycle parking floors'), the set rate of adjustment is RM40,000 per parking bay/lots. Thus, it is entirely clear that separate rates of adjustments, shall separately apply according to the type of floor within the building.

[6] Upon completion of the building, the parties could not agree on the final measurement to be accounted for in the calculation of the final purchase price. The plaintiff had initially filed an originating summons in 2014 for a declaration for re-measurement and payment. This originating summons went as far as the Court of Appeal via Appeal No W-02(NCVC)(A)-548–04 of 2015 ('Appeal 548'). Nonetheless, the Court of Appeal in Appeal 548 did not come into any conclusion as to the appropriate final measurement or the final purchase price. Instead on 17 November 2015, the Court of Appeal in Appeal 548 had directed that both parties are at liberty to hire their respective surveyors to re-measure the building with strict reference to cl 7A read together with the First Schedule of the SPA ('disputed COA direction').

[7] We have perused the grounds of judgment in the disputed COA direction and found that apart from insisting that the final re-measurement be made closely following the classification of the floors as per the First Schedule of the SPA, *there was nothing in the disputed COA direction to indicate that the appropriate areas should be further divided or classified between lettable or unlettable strata parcels or areas*:

> [29] *In our view, the details of the various floors/levels and respective floor area identified and agreed by the parties and listed out in PART II of the FIRST SCHEDULE could not be simply ignored. It was the proper description of the properties within the Office Block that was contracted to be purchased by Bellajade/purchaser*. Any re-measurement of the final floor area (for cl7A — adjustment to the final purchase price payable) had to therefore follow and be in accordance with the particulars of 'the properties' therein in PART II expressly spelt out.
>
> ...
>
> After having considered the respective submissions we were of the view that Clause 7A required, firstly, only such of the described floor areas as set out in PART II of the FIRST SCHEDULE to be included in any re-measurement to determine the final floor area, that is, before the purchase price was adjusted (at the rate specified in PART I of same schedule). Secondly, such re-measurement would have to be undertaken with specific reference to the DBKL approved amended building plans only. The liability on Bellajade/purchaser to pay any additional purchase price, if at all, would only be consequent to a properly carried out re-measurement in accordance with the two criteria stated above.

[8] Thus, if we were to go strictly based on the classifications as per the First Schedule, then the classification or contra-distinction only goes as far to classify the entirety of the ground floor to the 20th floor to be 'Office Space', the entire basement floors to be 'Car & Motorcycle Parking', the entire 21st floor to be the VIP holding lounge, and lastly the entire 22nd floor to be the 'lift motor room/viewing area'. There is nothing within the First Schedule, nor the disputed COA direction to indicate any intention or court direction that these contractual classifications be further dissected to exclude any specific portions of any respective floor.

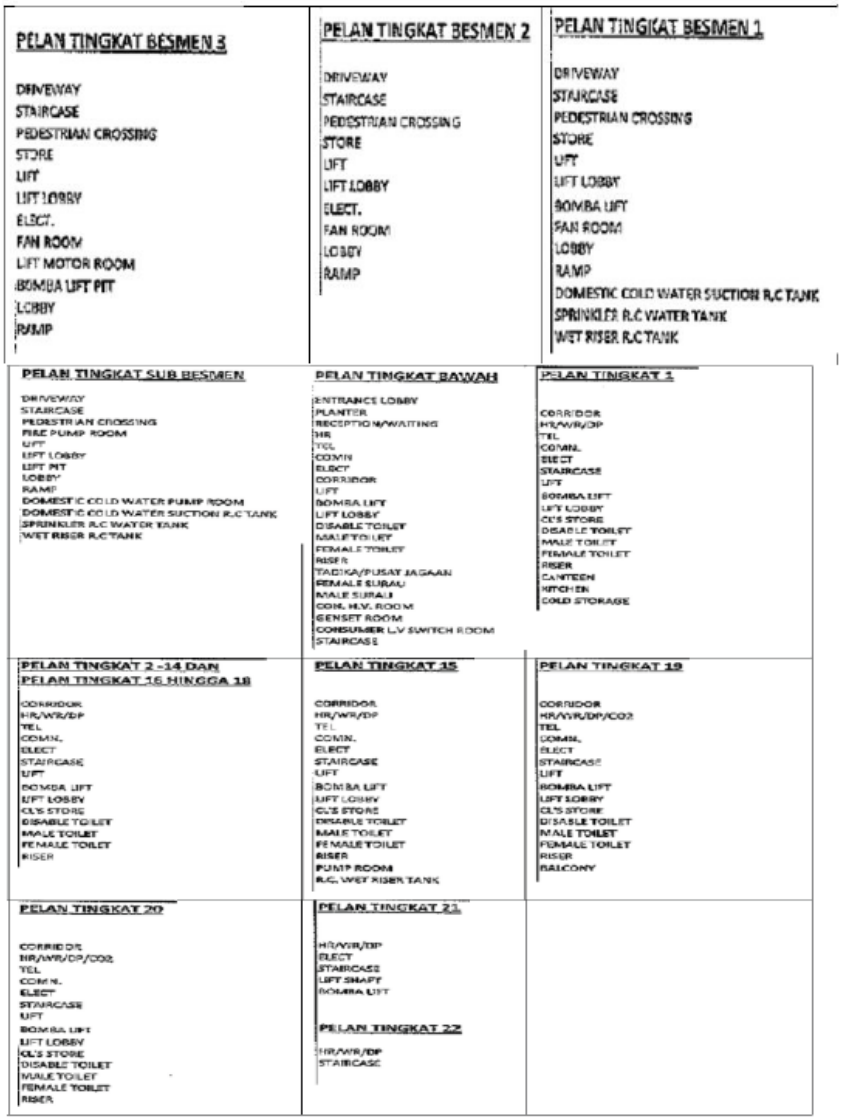
[9] In fact, the reason FSJ's prior survey was not accepted by the Court of Appeal had absolutely nothing to do with the inclusion or exclusion of any further classification of floor area beyond the broad classification mutually agreed under the First Schedule of the SPA. The only reason the COA did not accept FSJ's prior survey was simply that FSJ's prior survey did not meet the second criteria, in that the initial 'as built' drawing was not cross-referred with or compared to the DBKL approved amended building plans. The COA did not at all mention about any strata method of classification to exclude any specific portion of any floor. Thus, the COA's complaint was never against FSJ's 'as built approach' to re-measure the entirety of the floors. The portions and parts which the defendant are insisting to exclude now were not even mentioned in the COA's grounds of judgment:

> [32] It will be recalled that *FSJ in his testimony was himself unsure whether the 'as built drawing*' which he had used in deriving the measurements shown in his Tabulation, *were in fact the amended drawings that had been approved by DBKL*.
>
> [33] *In the result, Bellajade/purchaser, in our evaluation, has succeeded to show why the computation of the final floor area made by Juruukur Perunding for Orion/vendor was tainted with defects and ought not to be relied or accepted as being conclusive as to the final re-measured floor-area. No adjustment of purchase price could follow unless this was rectified.*

[10] Nonetheless, the parties remain at odds as to the appropriate areas to be accounted for in the calculation of the final measurement. The plaintiff in hiring its licensed surveyor, Foo Say Joon ('FSJ') claims a more modest sum of RM9,434,232 of additional 3,558 sq meters of floor areas. On the extreme contrary, the defendant via its own licensed surveyor one H'ng Kim Heng ('HKH'), somehow counterclaimed that there was a whopping shortfall of 18,473 sq meters and now claims that the defendant had overpaid an incredulous amount of RM45,886,932 of floor areas that allegedly should have been excluded from the calculation of the measurement and final purchase price for the building.

[11] The stark difference between the two surveys was simply that FSJ took the 'as built area' approach and measured the entire floors as listed within the

First Schedule of the SPA while HKH went beyond the broad classification agreed under the SPA and took the 'strata method' approach and measured only the lettable strata parcels on each floor excluding, inter alia, other portions of the floors such as the stairs, toilets, lobby areas, lift areas, driveways, corridors, surau, kitchen, and canteen. Contrary to the core essence and original intent of the SPA for the sale of the entire building, HKH treated the SPA as though it was instead a sale of strata parcels or separate strata units. HKH in his survey sought to exclude the following other portions of the respective floors in the building:



PELAN TINGKAT BESMEN 3

DRIVEWAY
STAIRCASE
PEDESTRIAN CROSSING
STORE
LIFT
LIFT LOBBY
ELECT.
FAN ROOM
LIFT MOTOR ROOM
BOMBA LIFT PIT
LOBBY
RAMP

PELAN TINGKAT BESMEN 2

DRIVEWAY
STAIRCASE
PEDESTRIAN CROSSING
STORE
LIFT
LIFT LOBBY
ELECT.
FAN ROOM
LOBBY
RAMP

PELAN TINGKAT BESMEN 1

DRIVEWAY
STAIRCASE
PEDESTRIAN CROSSING
STORE
LIFT
LIFT LOBBY
BOMBA LIFT
FAN ROOM
LOBBY
RAMP
DOMESTIC COLD WATER SUCTION R.C TANK
SPRINKLER R.C WATER TANK
WET RISER R.C TANK

PELAN TINGKAT SUB BESMEN

DRIVEWAY
STAIRCASE
PEDESTRIAN CROSSING
FIRE PUMP ROOM
LIFT
LIFT LOBBY
LIFT PIT
LOBBY
RAMP
DOMESTIC COLD WATER PUMP ROOM
DOMESTIC COLD WATER SUCTION R.C TANK
SPRINKLER R.C WATER TANK
WET RISER R.C TANK

PELAN TINGKAT BAWAH

ENTRANCE LOBBY
PLANTER
RECEPTIO N/WAITING
HR
TEL
COMM
ELECT
CORRIDOR
LIFT
BOMBA LIFT
LIFT LOBBY
DISABLE TOILET
MALE TOILET
FEMALE TOILET
RISER
TADIKA/PUSAT JAGAAN
FEMALE SURAU
MALE SURAU
COOK. HEV. ROOM
GENSET ROOM
CONSUMER L.V SWITCH ROOM
STAIRCASE

PELAN TINGKAT 1

CORRIDOR
HR/WR/DP
TEL
COMM.
ELECT
STAIRCASE
LIFT
BOMBA LIFT
LIFT LOBBY
CL'S STORE
DISABLE TOILET
MALE TOILET
FEMALE TOILET
RISER
CANTEEN
KITCHEN
COLD STORAGE

PELAN TINGKAT 2 -14 DAN PELAN TINGKAT 16 HINGGA 18

CORRIDOR
HR/WR/DP
TEL
COMM.
ELECT
STAIRCASE
LIFT
BOMBA LIFT
LIFT LOBBY
CL'S STORE
DISABLE TOILET
MALE TOILET
FEMALE TOILET
RISER

PELAN TINGKAT 15

CORRIDOR
HR/WR/DP
TEL
COMM.
ELECT
STAIRCASE
LIFT
BOMBA LIFT
LIFT LOBBY
CL'S STORE
DISABLE TOILET
MALE TOILET
FEMALE TOILET
RISER
PUMP ROOM
R.C. WET RISER TANK

PELAN TINGKAT 19

CORRIDOR
HR/WR/DP/CO2
TEL
COMM.
ELECT
STAIRCASE
LIFT
BOMBA LIFT
LIFT LOBBY
CL'S STORE
DISABLE TOILET
MALE TOILET
FEMALE TOILET
RISER
BALCONY

PELAN TINGKAT 20

CORRIDOR
HR/WR/DP/CO2
TEL
COMM.
ELECT
STAIRCASE
LIFT
BOMBA LIFT
LIFT LOBBY
CL'S STORE
DISABLE TOILET
MALE TOILET
FEMALE TOILET
RISER

PELAN TINGKAT 21

HR/WR/DP
ELECT
STAIRCASE
LIFT SHAFT
BOMBA LIFT

PELAN TINGKAT 22

HR/WR/DP
STAIRCASE

THE HIGH COURT'S FINDINGS

[12] The contrasting surveys came to a head before the High Court below. The learned High Court judge ('the learned judge') found that the disputed COA direction had directed the parties to re-measure the building following the defendant's strata method of calculation and to only account for the lettable strata parcels of each floor and not the entire floor. The learned judge then dismissed the plaintiff's claim and instead allowed the defendant's counterclaim in that the provisional measurement had accounted for floor areas that should have been excluded in the calculation of the purchase price:

> Having said the above, it is clear to this court that the whole remeasurement exercise undertaken by FSJ and his team was contrary to the directions given by the Court of Appeal and also to the provisions of the SPA itself. Thus, the plaintiff's claim for further payment based on the as built drawings and amended approved building plans by DBKL must fail.

THE APPEAL BEFORE US

[13] Dissatisfied with the learned judge's decision, the plaintiff appealed against the learned judge's decision to the Court of Appeal. The plaintiff's appeal was primarily leveraged on the following grounds:

(a) the learned judge's reading and interpretation of the SPA and the disputed COA direction was erroneous. Neither the SPA nor the disputed COA direction provided for the defendant's 'strata method approach' to only account for lettable strata parcel areas and to not account for the entirety of each floor of the building;

(b) the learned judge has erred in law and in fact in treating the SPA as though it was a strata sale when in actuality the SPA was an en bloc sale and purchase of an entire building; and

(c) the learned judge has erred in preferring the reading and interpretation by the defendant which does not yield to business common sense and went against the genesis of the SPA itself. It does not make any business sense that although having purchased the entire building, the defendant only owns and maintains the lettable strata parcels but not the other significant portions of the floors such as the stairs, toilets, lobby areas, lift areas, driveways, corridors, surau, kitchen, and canteen.

[14] When the present appeal was heard before us on 13 February 2023, both parties have mutually conceded on any adjustments to be made to the VIP holding lounge on the 21st floor and the lift motor room/viewing area on the 22nd floor. Thus, the only floors which remain in contention are *the office space floors (ground floor to the 20th floor)* and *the basement car and motorcycle parking floors*.

[15] We have perused the learned judge's grounds of judgment, both parties' written submissions, as well as the plaintiff's memorandum of appeal and found that the appeal before us can be determined by answering one singular issue:

> Whether or not the learned judge's preference to follow the defendant's interpretation of the SPA and the disputed COA directions is correct in law.

WHETHER OR NOT THE LEARNED JUDGE'S PREFERENCE TO FOLLOW THE DEFENDANT'S INTERPRETATION OF THE SPA AND THE DISPUTED COA DIRECTIONS IS CORRECT IN LAW

[16] Considering the entire breadth of the facts we have addressed in the first part of our judgment above, we find that the defendant's strata method of calculation is in direct contravention of the disputed COA direction and even the SPA itself.

[17] Firstly, and most tellingly, the terms and initial calculation of the provisional purchase price and floor areas mutually agreed in the SPA was already indicative of the actual intent of both parties regarding the appropriate floor area that should be accounted for. There is no rhyme and logic in the defendant's supposition that the discrepancy in the final measurement as against the initial provisional measurement was so material. It is certainly illogical that the parties would have 'fallen into grave error' to the massive extent that the parties 'mistakenly' included the entire floor of all respective floors (and not just the lettable strata areas).

[18] For example, it is certainly bewildering that the parties would have 'mistakenly' accounted for a whopping extra 65% of floor area in Basement 3, and a staggering extra 39% of floor area in the First Floor. It needs to be borne in mind that the defendant is contending that the parties have 'mistakenly' accounted for 12,713 sq meters of ramps and driveways in the car and motorcycle parking floors which comes up to a confounding RM31m of 'error' or 'miscalculation'. In fact, the defendant is claiming for a bewildering RM45,886,932 of floor area which was 'mistakenly' accounted for.

[19] The shortfall that the defendant is claiming is too drastic of a departure from the originally agreed provisional area accounted for in the SPA. *If indeed the parties have intended to only account for the lettable strata office parcels and the lettable parking bays, then the original provisional space accounted for should have already excluded these 'non-office space' or 'non parking space' parts of the floor* save for the lettable office and parking areas. But this was exactly NOT the case.

[20] With respect, the learned judge has unfortunately failed to appreciate this key fact in his interpretation of the SPA. *The fact that the original*

provisional measurements have taken into account the entirety of the floors, was already sufficient indication of the parties' mutual agreement to measure the entire 'as-built' floors instead of just the lettable strata portions of the floors.

[21] Furthermore, if we were to read the SPA in its purest and literal interpretation, it is significantly revealing that the parties have never made any classification or distinction beyond the definitions of 'OFFICE SPACE', 'CAR and MOTORCYCLE PARKING', 'VIP HOLDING LOUNGE', and 'lift motor room/viewing area'. The contra distinction is limited only to these descriptions or denominations according to the relevant floors in the building. There was absolutely no further dissections or strata classification of the floors. The office space floors were never classified or further divided into 'non-office space' of the toilets, corridors, lifts, lift lobbies, kitchen, or even the surau. Nor were the car and motorcycle parking floors ever classified or further divided into 'Non-Car & Motorcycle Parking' areas such as the driveway, the ramp, pedestrian crossing, lifts, and lobby.

[22] The four corners rule of interpretation is a salient rule of interpretation which the defendant cannot exempt itself from. Nor can the courts exert unnecessary discretion to deter party autonomy and improve on any party's bargain in a contract. We can do no better than to refer to the wisdom of the Federal Court in the landmark case of *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1:

> [26] We agree with the defendant that parties are bound by the terms of the contract which they entered into and *that it is the court's duty to give effect to the clear and plain meaning of the words in the said clause. That is quite trite*.
>
> ...
>
> [28] It is also trite that an agreement *must be construed by the words used in the agreement and the court is not empowered to improve upon the instrument which it is called upon to construct*. This we have stated in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597... (Emphasis added.)

[23] Thus, the learned judge had erred in going beyond the broad and limited classifications which were plainly agreed in the SPA. The learned judge had erred in improving the defendant's bargain in allowing the defendant to exclude portions of the floor area which were never covenanted to be excluded in the SPA.

[24] Considering our finding above, it naturally follows that the disputed COA direction must have also referred to the literal and plain classification as agreed under the SPA. The disputed COA direction had not found or directed the supposed further classification and exclusion as insisted by the defendant. Instead, the disputed COA direction had instructed parties to appoint their

respective surveyors to re-measure the floor areas closely following the terms of cl 7A read together with the First Schedule of the SPA. That be the case, even with the disputed COA direction, it remains incumbent upon the defendant to strictly follow the broad and limited classification as agreed under the SPA and not go above and beyond to further divide the floors into lettable and unlettable strata areas.

[25] Thus, reading both the SPA and the disputed COA direction in tandem, it stands to good reason that the definitions of 'OFFICE SPACE', 'CAR and MOTORCYCLE PARKING', 'VIP HOLDING LOUNGE', and 'LIFT MOTOR ROOM/VIEWING AREA' must have referred to the entirety of the floors in the building and not to any specific lettable strata portion of the floors.

[26] For the sake of completeness, we must strictly keep in mind that the defendant was purchasing the *ENTIRE BUILDING* and not any specific strata lettable space. Considering this en bloc purchase of the whole or entire building, we are inclined to agree with the plaintiff's counsel that it does not make any business or commercial sense that the defendant does not purchase, own, or maintain the building's amenities such as the suraus, the lift, the lobbies, corridors, stairs, toilets, driveways, ramps, risers, pump rooms, and balconies. Such an interpretation would lead to an artificial, unrealistic and unnecessarily convoluted situation.

[27] It would certainly be odd that the defendant as 'Landlord' of the building, still expects the plaintiff to own and maintain the amenities and common areas of the building. It must be kept well in mind that upon the completion of the SPA, the plaintiff should have no relation whatsoever with the building. This is excruciatingly clear considering the SPA clearly stipulates that the 'Building' refers to Plaza Palas. Thus, the SPA would lead the defendant to be the singular proprietor and landlord of Plaza Palas, and not merely any specific lettable strata parcels within Plaza Palas. Therefore, the defendant's reading of the SPA would lead to the nonsensical conclusion that the defendant although being the landlord of the entire building, would still be at the mercy of the plaintiff who would be the landlord and proprietor of the common properties, corridors, toilets, lifts, lobbies, ramps, and staircases of the building. No person or businessman in his right or sound mind, would want to own or hold onto just the unlettable portions of any building. There is no logical or commercial benefit for the plaintiff to maintain ownership of the corridors, toilets, staircases, lifts, or the lobbies of the building. None of these portions of the building can be sold off, leased, or rented out.

[28] The business and commercial sense approach of constructing or interpreting a contract was first propounded by the House of Lords in the

landmark case of *Prenn v Simmonds* [1971] 3 All ER 237. The House of Lords stated that:

> (a) even at the face of a clear term or wording of a clause (and there are two competing interpretations of the same term or wording), *the court must prefer the interpretation which makes 'commercial good sense'*:
>
> In the light of the aim of the agreement, and even on a purely linguistic construction, the references to 'profits' in paras (a) and (b) were to the consolidated profits of the group and not to the profits of the holding company, RTT Ltd, only; furthermore *this construction was in accordance with commercial good sense* ...
>
> (b) even if the terms of a clause is clear and unambiguous, *the court can still look beyond mere linguistic and literal considerations and look into the 'genesis' of the transaction (surrounding circumstances)* as to conclude an interpretation which makes good business sense:
>
> In order for the agreement of 6 July 1960 to be understood, it must be placed in its context. *The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations*.
>
> ...
>
> Surrounding circumstances may, he says, 'stamp upon a contract a popular or looser meaning' than the strict legal meaning, *certainly when to follow the latter would make the transaction futile*.

[29] Succinctly, if there are two competing interpretations of the same term in a contract, the court cannot subscribe to the interpretation that is counterintuitive to the business sense of the transaction, or the interpretation which would make the transaction futile. Instead, the court ought to prefer the other interpretation which makes more business sense in line with the commercial purpose of the transaction.

[30] The Federal Court in *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770 has expressed the same sentiment:

> *In this case, we would also assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading* and the kind which is actionable in a passing off action. We would also adopt the same reasoning to say that we should not manipulate the contractual word 'competition' used in cl 5 to say that the appellants cannot be restrained from unfair competition. We would also quote and adopt the following words of Lord Diplock in yet another recent case of *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191:
>
> ... *if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense*. (Emphasis added.)

[31] In recent times, the Federal Court has upheld the same principle in the case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 for the courts to prefer the interpretation that makes business common sense in cases where there are two or more competing interpretations:

> Thus, the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of *Arnold v Britton*), where His Lordship accepted the unitary process of construction in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 para 21 that:
>
> > ... if there are two possible constructions, *the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*. (Emphasis added.)

[32] We also refer to the commonwealth decision in the Court of Appeal's decision in *Bon Chong Hing & Anor v Gama Trading Company (Hong Kong) Ltd* [2011] 4 MLJ 52; [2011] 6 CLJ 493:

> [35] From all these authorities, the following principles can be discerned. That the task of interpreting a contract requires an objective approach. And the court must determine the objective aim or purpose of the transaction and this is usually done by taking into account the factual matrix that forms the background to the contract. At the end of the day, the correct test to apply is the test of a reasonable man and this is said to be the stamp of an objective approach as opposed to the subjective view of a party to the contract. *Of course, emphasis is always placed on the words used in the contract but where the words used lead to a conclusion that defies business logic, then the contract must be construed in such a way as to make it conform to business logic*. (Emphasis added.)

[33] In applying the principles above, we ask the question, what is the genesis, and true commercial purpose of the mutually agreed SPA? The true commercial purpose of the SPA must necessarily be that the plaintiff would want to sell and the defendant would want to purchase the ENTIRETY of the building and not just the specific lettable strata areas of the building.

[34] The illogicality in the defendant's interpretation is apparent. The defendant covenanted to purchase the ENTIRE building to become the sole proprietor of both the lettable areas and the unlettable common areas and amenities of the building. It is plain logic that the plaintiff would not insist on owning, keeping, and maintaining the unlettable amenities and common areas of the building as there is neither commercial nor business advantage in owning mere corridors, toilets, suraus, pedestrian crossings, balconies, and staircases of the building. Thus, the defendant's insistence that the SPA excludes these unlettable areas is rather preposterous and devoid of business sense. Such a sale would only leave the plaintiff in an awkward position of being a landlord over

toilets, corridors, and staircases. These amenities come as a package with the building and are sold with the building. Would that mean that the defendant would have to 'rent' these amenities from the plaintiff? The fact that this question had to be raised is certainly telling of the absurdity of the defendant's interpretation.

[35] Taking the words of the Federal Court in *Seet Chuan Seng*, the plaintiff (as a reasonable man) would never take leave of his senses and agree to such a term which would leave the plaintiff to keep and maintain ownership of unlettable common areas and amenities of the building or else these unlettable areas are sold for free.

[36] Equally so for the defendant, the defendant would never agree to such a term which would leave the defendant in a precarious and awkward position in that it would be left at the mercy of the plaintiff as the 'Landlord' who reigns over the amenities and common areas which would allow the building to function as an office building or an apartment. This absurd interpretation proposed by the defendant would defy the very fabric and essence of the sale to be commercially logical and sensible. Thus, we must accordingly yield the interpretation to the more sensible interpretation following the interpretation proposed by the plaintiff.

[37] The true and actual genesis of the SPA must have been that the descriptions used in the First Schedule of the SPA would refer to the floors IN ITS ENTIRETY and not merely any specific lettable portions which the defendant had unilaterally categorised and insisted upon.

[38] Considering all of the above deliberation, we answer *this singular issue in the NEGATIVE*. It was wrong for the learned judge to prefer and follow the defendant's interpretation of the SPA and the disputed COA directions. Thus, the learned judge had erred in denying the plaintiff's claim for shortfall of payment for excess of floor area. The learned judge had also erred in allowing the defendant's counterclaim for an alleged shortfall of floor area.

QUANTUM OF DAMAGES TO BE AWARDED

[39] Based on FSJ's surveys and reports (and factoring out the 21st floor (the VIP holding lounge) and the 22nd floor (the lift motor room/viewing area), the excess of floor area identified for the office space floors (from the ground floor to the 20th floor) is a sensible and modest 442 sq meters. Thus, using the contractually agreed rate of adjustment of RM2,484,00 per sq meters, the appropriate amount of price adjustment shall be RM1,048,248 (442 sq meters x RM2,484,00 = RM1,048,248). Thus, we set aside the learned judge's

decision and order and hereby allow judgement to be entered for RM1,048,248 to the benefit of the plaintiff-appellant.

[40] Now, specifically regarding the car and motorcycle parking floors, we find that the defendant is NOT ENTITLED TO EXCLUDE any specific portion of these basement floors (inclusive of and not limited to the ramps, stairs, pedestrian crossings, and driveways). Therefore, we set aside the learned judge's decision and order and we now *dismiss the entirety of the defendant's exorbitant RM45,886,932 counterclaim* for the alleged shortfall of 18,473 sq meters of floor area.

[41] Nevertheless, we are also minded not to award any re-adjustments to the plaintiff in respect of the car and motorcycle parking floors. This is simply because the SPA has already stipulated a distinct and separate rate of adjustment of RM40,000 per parking lot for the car and motorcycle parking floors. Thus, the re-measurement for the car and motorcycle parking floors can only be done on a per parking lot/bay basis and not on a per square meter basis. Therefore, considering that there was no change in the total number of parking lots or bays, there are no adjustments that should be made.

OUR DECISION

[42] Considering all of the above deliberations, we hereby ALLOW the present appeal to the extent of the following. We firstly set aside the entirety of the learned judge's decision and order. We set aside both the learned judge's decision and order in dismissing the plaintiff-appellant's claim and allowing the defendant-respondent's counterclaim.

[43] Following the setting aside and reversal of the High Court's decision and order, we accordingly enter judgment and orders as follows:

(a) the plaintiff-appellant is entitled for adjustments of the purchase price for an additional RM1,048,248 ('judgment sum') (for the excess of floor area of 422 sq meters in the office space floors);

(b) no parties are entitled for adjustments in respect of the car and motorcycle parking floors as there were no changes as to the total number of parking lots/bays;

(c) the defendant is not entitled to exclude any specific portions of any of the floors in the building and hereby is not entitled to claim for the shortfall of floor areas as per the defendant's counterclaim; and

(d) we also order interest of 5%pa upon the judgment sum to run from the date of the originating summons until the full settlement and realisation of the judgment sum by the defendant-respondent.

A **[44]** We also order that the defendant-respondent to be liable to pay costs of RM25,000 to the plaintiff-appellant here and below, subject to allocator.

Appeal allowed; High Court's decision set aside. Judgment sum of RM1,048,248 granted to appellant.

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Reported by Ashok Kumar

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